FILED
DEC 15 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-263

In the Supreme Court of the United States

RACHEL HAAS, et al.,

Petitioners.

v.

QUEST RECOVERY SERVICES, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY*
State Solicitor
**Counsel of Record*
HOLLY J. HUNT
ELISE PORTER
Assistant Solicitors
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
State of Ohio

QUESTIONS PRESENTED

1. Does a state sentencing judge have absolute judicial immunity from suit for alleged discriminatory acts that occur at the privately-run rehabilitation facility where a defendant serves her sentence?

2. Do States retain their Eleventh Amendment immunity against money-damages suits brought in federal court under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 to 12165, if the plaintiff does not allege court-access issues or any independent constitutional violation?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

STATEMENT OF FACTS 2

REASONS FOR DENYING THE WRIT 3

A. The absolute judicial immunity issue does not warrant the Court's review 4

B. The issue regarding Title II and Eleventh Amendment immunity does not warrant full review or remand 5

1. The Court cannot reach the issue of Title II's abrogation of States' Eleventh Amendment immunity, because Haas cannot overcome judicial immunity and she has not otherwise properly stated a claim against a state actor 5

2. Haas's Eleventh Amendment argument does not warrant the Court's full review 7

3. This case should not be remanded to the Sixth Circuit for it to review the Eleventh Amendment issue 9

CONCLUSION 11

TABLE OF AUTHORITIES

Cases **Page(s)**

Bradley v. Fisher,
80 U.S. (13 Wall) 335 (1872) 4

Bush v. Rauch,
38 F.3d 842 (6th Cir. 1994) 7

City of Boerne v. Flores,
521 U.S. 507 (1997) 8

Forrester v. White,
484 U.S. 219 (1988) 4

Johnson v. City of Saline,
151 F.3d 564 (6th Cir. 1998) 1, 6

Mireles v. Waco,
502 U.S. 9 (1991) 7

Pennsylvania Dept. of Corrections v. Yeskey,
524 U.S. 206 (1998) 7

Pierson v. Ray,
386 U.S. 547 (1967) 5

Tennessee v. Lane,
541 U.S. 509 (2004) 7, 8

United States v. Georgia,
546 U.S. 151, 126 S. Ct. 877 (2006) 4, 7, 8, 9

United States v. Raines,
362 U.S. 17 (1960) 8

Statutes and Regulations

Title II, Americans with Disabilities Act of 1990,
42 U.S.C. §§ 12131 to 12165 ..... *passim*

Ohio Admin. Code Ann. 3793:4-1-02 2

INTRODUCTION

This case does not warrant review or remand for several reasons. Petitioner Rachel Haas purports to raise, in her first question presented, an issue that may be important and interesting, but is here unreachable—Ohio's Eleventh Amendment immunity from suit under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131 to 12165. That issue can never be reached here because the State of Ohio could be liable under the ADA only under two theories, neither of which is viable in this case.

First, the alleged discriminatory acts—all by private parties—took place in a building owned by the State of Ohio, but leased to the private company through intermediaries. Ohio might arguably be liable under the Rehabilitation Act ("RA")—and therefore also Title II because it owns the building in which the allegedly discriminatory acts took place. *Johnson v. City of Saline*, 151 F.3d 564 (6th Cir. 1998). However, that aspect of its liability—our derivative liability as a property owner that did not run the program—was settled with petitioner. And with that form of liability no no longer active, the case now involves only direct-discrimination claims against Ohio.

But the direct-liability theory does not work for Haas here against the State. The only direct state actor in the drama is the state municipal court judge who sentenced Haas to the private rehabilitation program that allegedly discriminated against her. Thus, to reach the ADA question, Haas has to overcome the judge's absolute judicial immunity. That is why Haas raises judicial immunity in her second question presented. But that question should be first, as the Court must reach it and resolve it in Haas's favor before getting to the ADA issue. But Haas cannot clear that first hurdle, as the Court has no reason to revisit its longstanding and consistent jurisprudence on judicial immunity.

Moreover, even if the Court could reach the Eleventh Amendment-ADA question, this case is a poor vehicle, because Haas's complaint did not allege the violation of *any* constitutional right by *any* state entity, and therefore has not invoked Congress's power to enforce the Fourteenth Amendment.

Indeed, the United States's brief confirms that this case is a poor vehicle to review the ADA issue, as the United States does not ask for full review, but asks only for remand so that the Sixth Circuit can correct its analysis. But even remand is unwarranted here, as the Sixth Circuit came to the correct conclusion regarding Title II discrimination by private parties, even if the court arguably used the wrong Eleventh Amendment analysis in dicta. For these and other reasons below, the Petition should be denied.

STATEMENT OF FACTS

Rachel Haas became disabled when she drove an all-terrain vehicle while drunk, crashed into a truck, and sustained severe injuries that resulted in permanent disabilities. At her criminal trial, she pleaded guilty to the charge of driving under the influence of alcohol. As an alternative to incarceration for her DUI conviction, Judge Richard Kubilus of the Canton Municipal Court ordered her to attend a driver intervention program run by Quest Recovery Systems, Inc. ("Quest"), a private entity. She was to undergo two six-day driver intervention programs (DIPs) conducted by Quest.

Under Ohio law, entities providing DIPs must not discriminate on the basis of disability and must make the programs available to disabled clients. For example, the Ohio Administrative Code contains a client's bill of rights for DIPs that includes the right to be free of disability discrimination. Ohio Admin. Code Ann. 3793:4-1-02. The law also requires private DIPs to have a procedure for clients to grieve alleged discrimination or mistreatment on the basis of disability. *Id.*

Haas alleges that Quest discriminated against her in the program by failing to accommodate her disabilities. Quest therefore failed to follow the legal requirements of Ohio law, without the sanction or knowledge of the State of Ohio.

Haas sued both Quest and the State of Ohio, raising state law claims against Quest and federal claims under the ADA and the RA against both Quest and the State. Haas settled all her claims with Quest for an undisclosed sum, and her RA claims against the State.[1] The only remaining claims here are for Title II direct disability discrimination by the State of Ohio.

Both the District Court and the Sixth Circuit Court of Appeals correctly dismissed all direct discrimination claims against the State of Ohio because the discriminatory acts were all performed by a private party, without either the knowledge or sanction of the State of Ohio. Both courts also held that the judge who sentenced Haas is protected by absolute judicial immunity.

REASONS FOR DENYING THE WRIT

The Petition should be denied, as full review is not needed here, and the Court need not grant, vacate, and remand the case either. The judicial-immunity issue is not certworthy, and Haas loses that issue under settled law. Thus, the Court cannot even reach her purported ADA/Eleventh Amendment issue.

Second, even if the Court were to reach the Eleventh Amendment question, Haas did not allege the violation of *any* constitutional right by *any* state entity, and therefore has not invoked Congress's power to enforce the Fourteenth Amendment. As the United States correctly asserts, the Sixth Circuit affirmed the District Court holding that Petitioner Haas failed to state a claim against the State of Ohio under

---

[1] The RA claims against the State arise because it ultimately owned the building that was leased, through two intermediaries, to Quest.

Title II. Pet. App. 6a-9a; U.S. Br. 8. As the rehabilitation program that Haas attended was not run by the State of Ohio, nor was its discrimination sanctioned by state statute or regulation, the State of Ohio did not discriminate "in the operation of public services, programs," or "activities." Under the analysis articulated in *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877 (2006), the Sixth Circuit should have stopped there, and its Eleventh Amendment analysis was unnecessary and superfluous.

And the United States seeks a futile act in asking the Court to grant certiorari only to remand for the Sixth Circuit to reanalyze its Eleventh Amendment dicta in light of *Georgia*. The United States acknowledges that the State was properly dismissed, and that acknowledgement means that the United States also agrees that the Eleventh Amendment analysis below was merely dicta. Remanding a case simply to eliminate dicta is unnecessary and a waste of judicial resources. Thus, the petition should simply be denied.

A. The absolute judicial immunity issue does not warrant the Court's review.

The Court need not revisit its jurisprudence regarding the absolute immunity of judicial officers. Haas asserts neither conflict in the circuits nor overriding policy arguments compelling the Court's review of its judicial immunity decisions or the lower courts' decisions on judicial immunity in this case.

Long-standing and consistent precedent holds that judges have absolute judicial immunity when engaged in a judicial function. *Forrester v. White*, 484 U.S. 219, 226-27 (1988). Indeed, the history of absolute judicial immunity goes back at least to English common law. See *Bradley v. Fisher*, 80 U.S. (13 Wall) 335, 349 (1872), citing *Scott v. Stansfield*, 3 Law Reports Exchequer 220. Moreover, the Court has held that absolute judicial immunity applies with undiminished force even when the judge is accused of

discriminating on the basis of race in violation of 42 U.S.C. § 1983, much less when discriminating on the basis of disability. *Pierson v. Ray*, 386 U.S. 547, 553-555 (1967). And even if discrimination created an exception to judicial immunity, the exception would not be implicated here, since Haas admits that the judge had no intention of subjecting her to disability discrimination: "There is no reason whatsoever to believe that Municipal Judge Kubilus had intended for [Haas] to be confined in a non-compliant facility." Pet. at 20.

In short, Haas has presented no sound reason for the Court to take her second question presented and revisit its holdings on absolute judicial immunity. Haas's arguments reveal her real motive for challenging judicial immunity: Haas needs to overcome judicial immunity to reach the State, as she has no other way to collect damages from the State of Ohio for the acts of Quest, a private entity from whom she has already collected an undisclosed amount in damages. But Haas's desire to reach the State is no reason to revisit the settled issue of judicial immunity.

B. The issue regarding Title II and Eleventh Amendment immunity does not warrant full review or remand.

1. The Court cannot reach the issue of Title II's abrogation of States' Eleventh Amendment immunity, because Haas cannot overcome judicial immunity and she has not otherwise properly stated a claim against a state actor.

Title II does not create a cause of action against a State for the actions of private parties. But Haas's allegations are focused on Quest, the private entity that housed the program she attended in lieu of her prison sentence. Haas's amended complaint included only two allegations against the State of Ohio for direct discrimination:

> 16. At all times . . . Quest acted as an agent and/or extension of the State by performing a quasi-governmental function under the ultimate supervision, direction, and control of the Court and/or State. . . .
>
> 38. . . . The court and/or State further subjected Plaintiff to discrimination by . . . ordering her to be confined in a privately operated system [Quest].

But Quest cannot simultaneously be both a state agent (as in her paragraph 16) and a private party (as in her paragraph 38), so these allegations do not directly link Quest or its actions to the State of Ohio.

Haas grasps at two factors remotely linking the State of Ohio to her claims—the municipal court judge and the building in which Quest housed its programs—but neither of these factors creates liability for the State of Ohio under Title II.

First, Ohio's ownership of the building where Quest ran its program does not create a direct-discrimination claim against the State of Ohio. In *Johnson v. City of Saline*, 151 F.3d 564, 571-72 (6th Cir. 1998), the Sixth Circuit held that a public entity that leases or rents its facilities to nonpublic entities is subject to Title II of the ADA because it is a landlord. The district court below found that the State of Ohio is subject to liability as a landlord because of its ultimate ownership of the Quest building, but the State of Ohio and Haas settled that part of the case. And because Quest is not a public entity, the State of Ohio is not subject to direct liability under Title II.

Second, Haas cannot reach the State through the judge's acts, as she cannot overcome judicial immunity. Judicial immunity is overcome only in two circumstances, neither of which Haas even alleges apply: "First, a judge is

not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Mireles v. Waco*, 502 U.S. 9, 11-12 (1991). Because issuing an order is judicial in nature, see *Bush v. Rauch*, 38 F.3d 842, 847 (6th Cir. 1994), the first circumstance does not apply. And of course, the municipal court judge had jurisdiction to sentence Haas for violating Ohio's DUI laws. Therefore, the judge is absolutely immune, and no link between the State of Ohio and the municipal court judge exists.

Haas cites only one case to support her claimed right to pursue a Title II claim. See Pet. at 18, citing *Pennsylvania Dept. of Corr. v. Yeskey*, 524 U.S. 206 (1998). But *Yeskey* involved a prison in which state employees, and not private parties, were alleged to have committed acts that violated the ADA. See *id.* Haas fails to cite a single case in which disabled prisoners sue under Title II based on the judge's act in sentencing them, rather than direct acts of discrimination by state employees of the prisons.

Thus, the Sixth Circuit properly concluded that Haas failed to state a Title II claim against Ohio. Consequently, the Court cannot reach the question of whether Haas's Title II claim would be the type that could overcome Ohio's Eleventh Amendment immunity, as Haas has not even stated a Title II claim of any type against Ohio.

2. Haas's Eleventh Amendment argument does not warrant the Court's full review.

Even if the Court could somehow reach the first question presented, this case is a poor vehicle to review any question of State immunity from Title II claims. Specifically, this is not an appropriate case for the Court to refine or clarify either *Tennessee v. Lane*, 541 U.S. 509 (2004), as Haas suggests, or its recent holding in *United States v. Georgia*, which Haas's brief does not mention. Each of these

cases may leave open interesting and important questions, but none of those questions is presented here.

First, this case would not clarify the scope of the constitutional guarantees that plaintiffs may enforce against the States under Title II. *Lane* and *Georgia* both held that, at a minimum, state sovereign immunity was abrogated for conduct that actually violates the Fourteenth Amendment, and that it is not limited to violations of the Eighth Amendment. *Lane*, 541 U.S. at 531; *Georgia*, 126 S. Ct. at 882. In *Lane*, the Court stated that "[b]ecause we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further." 541 U.S. at 531, citing *United States v. Raines*, 362 U.S. 17, 26 (1960). Haas does not even allege a court-access issue. And even if doubts remain about which constitutional guarantees are enforceable against the States through Title II, that issue is absent here because Hass's complaint fails to allege any violation of a constitutional right at all. Rather, she alleges only a violation of the ADA.

Nor would this case clarify the scope of prophylaxis Congress is constitutionally permitted to apply to remedy disability discrimination by state actors. When Congress purports to exercise its authority under Section 5 of the Fourteenth Amendment, the Court requires "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). But this case does not present the question of whether Title II is congruent and proportional under *Boerne*, because Haas alleges no direct activity by a state actor or agent. All of the alleged discriminatory acts were committed by private parties in the employ of a private company. Ohio never sanctioned the alleged discriminatory actions, nor does Ohio law permit them.

In short, this case presents no interesting and important questions about the application or constitutionality of Title II of the ADA, so the Court should deny the writ.

3. This case should not be remanded to the Sixth Circuit for it to review the Eleventh Amendment issue.

Finally, not only is this case not worthy of the Court's full review, but also, the case does not warrant remand for reconsideration, as remand would not change the result below. The Sixth Circuit properly dismissed the State of Ohio because Haas failed to state a claim against it. Thus, the Eleventh Amendment discussion was dicta. Further, if the Court were to remand this case for its consideration under the test recently established in *United States v. Georgia*, 546 U.S. 151 (2006), the outcome would remain the same—a dismissed complaint against the State of Ohio.

The Sixth Circuit's Eleventh Amendment discussion is dicta because it first held that Haas failed to state a Title II claim against the State of Ohio. As the lower courts recognized, "the Haases are in effect suing the State of Ohio in an attempt to sue the municipal court judge." See Pet. App. 7a. As discussed in Part B.1 above, the lower courts correctly determined that the State of Ohio is not liable for criminal sentences issued by a municipal court judge. The Sixth Circuit therefore properly affirmed the district court's dismissal because Haas failed to satisfy pleading requirements. See Pet. App. 9a. Thus, the Sixth Circuit's Eleventh Amendment immunity analysis is unnecessary to its disposition of the case. Consequently, vacatur and remand would be a waste of judicial resources, as the result would remain the same.

Further, even if the Sixth Circuit applied the three-step framework set forth in *United States v. Georgia*, the Sixth Circuit would arrive at the same result. The first prong of the *Georgia* step requires a court to determine in the first

instance, on a claim-by-claim basis, which aspects of the State's alleged conduct violated Title II. Again, the State of Ohio did not violate Title II, because Haas fails to allege any direct act of discrimination by the State of Ohio.

Only if the State has violated Title II does the court proceed to the second step to analyze the extent to which such misconduct also violated the Fourteenth Amendment. So even if Haas had alleged that the State of Ohio violated Title II, Hass still falls short, as she fails to assert any constitutional violation by the State of Ohio.

Finally, even if Haas could somehow reach step three, she would fail that step, in which a court analyzes, insofar as the alleged misconduct violated Title II but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid. And yet again, because Haas fails to assert that any action by the State of Ohio violated Title II of the ADA or the Fourteenth Amendment, the Sixth Circuit would not need to reach the issue of Eleventh Amendment immunity. This case therefore does not need to be addressed under the *Georgia* analysis.

Thus, the Sixth Circuit's result would be the same under the *Georgia* analysis. The only reason for remand would be to eliminate dicta, and that is not a good reason to further consume judicial resources on a case that fails to state a claim. If the United States wishes to litigate the immunity issue in the Sixth Circuit, it can and should wait for a live case that truly raises the issue.

CONCLUSION

In sum, the decision below does not warrant either review or remand. The Petition should be denied.

Respectfully submitted,

JIM PETRO
Attorney General of Ohio

STEPHEN P. CARNEY*
State Solicitor
**Counsel of Record*
HOLLY J. HUNT
ELISE PORTER
Assistant Solicitors
30 East Broad Street,17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax

Counsel for Respondent
State of Ohio

December 15, 2006